IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 901

BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER SULLIVAN, individually and as President of the said Union, PADDY SULLIVAN, individually and as an officer of the said Union, and HYMAN BERNSTEIN, individually and as business agent of said Union, all of 265 West 14th Street, New York City,

Petitioners,

against

HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

BRIEF FOR PETITIONERS

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I

Opinions of Courts Below

The Supreme Court of the State of New York made findings of fact and conclusions of law (R. 46-60) and rendered an opinion in writing (14 N. Y. Supp. [2nd] 198; no official report) (R. 179, 180). The majority of the Appellate Division of the Supreme Court of the State of New York, First Department, wrote no opinion. The minority opinion was written by Mr. Justice Callahan, Mr. Justice Dore concurring (259 App. Div. 868, 19 N. Y. Supp. [2nd] 811) (R. 189, 190). The Court of Appeals of the State of New York wrote no opinion (284 N. Y. 788).

II

Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court to review the judgment of the Court of Appeals of the State of New York is Section 237-b of the Judicial Code of the United States (Title 28, U. S. C., Sec. 344-b).

III

Statement of the Case

A. The Judgment to be Reviewed

The writ of certiorari granted to the petitioners by this Court brings up for review a judgment of the New York State Supreme Court which enjoins the admittedly peaceful and orderly picketing of the members of a labor union in the course of a labor dispute. The plaintiffs in the action were Hyman Wohl and Louis Platzman, the respondents herein, and the defendants were Bakery and Pastry Drivers and Helpers Local 802 of the International Brotherhood of Teamsters, a labor union affiliated with the American Federation of Labor, and Peter Sullivan, Paddy Sullivan and Hyman Bernstein, the officers of the said union, the petitioners herein. The nature of the acts prohibited by the said injunction, and of the labor dispute out of which the acts arose, will hereinafter be considered in detail.

On June 2, 1941, this Court granted the petition for a writ of certiorari herein, and upon granting the petition unanimously reversed the judgment of the Court of Appeals of the State of New York which upheld the injunction issued by the New York Supreme Court. The said petition was granted upon the petitioners' application for

rehearing, the petition having previously been denied for failure to show that the Federal question had been raised in the court below. The order of this Court granting the petition was stated as follows:

> "*Per Curiam:* The petition for rehearing is granted. The order denying certiorari is vacated and the petition for writ of certiorari is granted. The judgment is reversed. American Federation of Labor v. Swing, No. 56, decided February 10, 1941." (313 U. S. ——).

The aforesaid judgment is presently before this Court for review by reason of the granting of the respondents' application for rehearing.

B. The Acts Enjoined

The conduct prohibited by the injunction issued by the New York State Supreme Court consisted solely of the peaceful publicizing of the contentions of the defendant labor union with respect to the merits of a labor dispute.

No activity on the part of the defendant union other than the peaceful and orderly use of the spoken and written word has ever been involved in the case at bar.

In protest against the evils of the peddler system, a method of distribution gravely menacing the welfare of labor organizations, the petitioners engaged in peaceful picketing for the purpose of enlisting the support of the public.

The specific object of the union was to induce the respondents, who worked seven days each week without respite, to hire members of the union as relief drivers for one day of the week, so that the working conditions in the baking industry achieved by the union would not be destroyed.

The placards displayed by the union in the course of the picketing in question were in the following language:

"HYMAN WOHL

A BAKERY ROUTE DRIVER WORKS SEVEN DAYS A WEEK WE ASK EMPLOYMENT FOR A UNION RELIEF MAN FOR ONE DAY HELP US SPREAD EMPLOYMENT & MAINTAIN A UNION WAGE HOUR AND CONDITION.

BAKERY & PASTRY DRIVERS & HELPERS LOCAL 802 I. B. OF T. affiliated with A. F. L." (R. 57).

Admittedly, there was no misrepresentation or fraud practiced by the union by the use of these placards, nor was it claimed by the plaintiffs that there was any misrepresentation or fraud practiced in any other manner (R. 55).

The only picketing which took place occurred in the public streets in the neighborhood of two wholesale bakeries where the plaintiffs had their headquarters and obtained the products which they distributed. These two bakeries were known as Diamond Baking Co., Inc., and Bernstein & Dickerman. The entire picketing in question was extremely brief in duration, and lasted in all about two hours on each of two days (R. 57).

Apart from such picketing, the only labor activity in which the defendant union engaged in reference to this dispute consisted of requesting about five of the retail dealers, who purchased the products peddled by the plaintiffs, not to deal with the plaintiffs, and likewise requesting the two bakery firms above mentioned not to distribute baking products through such peddlers. There was never any picketing of these retail dealers or bakers.

C. The Peddler System

The method of distribution known as the peddler system merits careful consideration here, for examination of the social and economic consequences thereof demonstrates conclusively that there is no reasonable basis upon which to support the New York State Court's absolute prohibi-

tion of utterance critical of that type of enterprise. Assuming the possibility of a difference of opinion with respect to the merits of the peddler system, it is nevertheless clear that reasonable persons may legitimately hold the opinion that the system is socially and economically undesirable and that it should be opposed. Accordingly, there is no factual justification for branding peaceful opposition to the peddler system as an "illegal objective" and prohibiting the exercise of the privilege of free speech by opponents of that system. On the contrary, the facts which appear in the record definitely establish the existence of sound economic and social reasons for opposing the peddler system and for protecting the constitutional privileges of its opponents.

Although in some forms peddling has undoubtedly existed for many years, in its present form peddling is an economic phenomenon which has only recently become a menace to the standards of wages and working conditions achieved by labor organizations.

After the enactment of the Social Security and Unemployment Insurance laws the number of peddlers in New York City, in the baking industry alone, rose from 50 to more than 500 (R. 50, 51).

During the 18-month period immediately preceding the labor dispute here in question, at least 150 drivers were discharged, and were required to sever connections with the employers by whom they had been employed, unless they undertook to become peddlers (R. 51).

The peddler, although economically subservient to the manufacturers whose products he distributes, assumes the role of an independent entrepreneur, buying bakery products from manufacturers and selling to retail dealers. Technically, the peddler is not an employee; realistically, his economic position is identical. Unfortunately, however, the peddler, insulated as he is by the honorific title of independent entrepreneur, is deprived of the ordinary benefits provided for employees.

The economic status of the peddlers in the case at bar may be considered typical. The plaintiff Wohl had a gross income of approximately $32 per week, and the plaintiff Platzman a gross income of approximately $35 per week, out of which income the plaintiffs were required to pay the maintenance and operation costs of the trucks used by them for peddling, and out of which they were also obliged to carry outstanding credits on their routes (R. 56).

It was established upon the trial, without dispute, and found by the Trial Court, that the peddlers in the case at bar, and peddlers generally, are not covered by Social Security benefits, Unemployment Insurance, or Workmen's Compensation Insurance (R. 53), and that the plaintiffs did not carry public liability or property damage insurance on the trucks which they operated (R. 53, 54) and that the plaintiffs did not conform to any uniform standard of wages or hours, but worked seven days each week (R. 56).

The trucks operated by the plaintiffs were registered in their wives' names (R. 55, 56).

It is obvious that the uncertain living earned by peddlers such as the plaintiffs is barely at the subsistence level, and that the slightest misfortune is sufficient to plunge such persons far below that level. In this desperate plight it is not reasonably to be expected that the peddlers will maintain decent standards of working conditions. In their insecure and unorganized condition, the peddlers not only reduce their own standards to the lowest possible level, but also inevitably reduce the standards in the entire baking industry.

It is axiomatic that conditions in one part of an industry affect other parts, and that labor organizations must, in order to preserve existing standards, prevent deterioration elsewhere. The menace of the peddler system to the defendant union in the case at bar is obvious, and it is likewise obvious that if the union is throttled when it seeks to raise its voice in opposition to the peddler system, the number of peddlers will constantly increase as manufac-

turers take advantage of this cheaper method of distribution. The Trial Court definitely found that the peddler system was a direct menace to the union:

> "32. That 'peddlers' or independent jobbers are not covered by Workmen's Compensation Insurance, Social Security or Unemployment Insurance, and that an employer who changes his method of distribution from using employee drivers to 'peddlers' or independent jobbers saves considerable by way of premiums and taxes.
>
> 33. That if those who are presently employers and parties to contracts with the unions upon the expiration of those contracts, to survive, are required to adopt the 'peddler' system of distribution, then the wages, hours, working conditions, six-day week, etc., attained by the union after long years of struggle will be destroyed and lost" (R. 52).

D. The Means Adopted by the Union

The program of the union in the case at bar was undertaken in good faith and was in no respects arbitrary or coercive. Primarily, the union sought to induce the peddlers to accept membership in the union (R. 52). Peddlers who applied for membership were granted all the rights and privileges of other members (R. 53). Peddlers who refused to become members were asked to work six days per week, instead of seven, and to hire a union relief driver for the seventh day (R. 53). Such relief drivers were to be paid only for that portion of the day during which they worked (R. 54).

Picketing for the purpose of enlisting public support was resorted to only when the steps previously outlined had failed.

Both of the plaintiff peddlers had applied for membership in the defendant union, and Platzman actually became a member but was delinquent in the payment of his dues (R. 52, 53, 149-151).

Because of the refusal of the plaintiffs to maintain union standards by engaging a union driver for one day out of

seven, the peaceful picketing above mentioned was conducted by the union (R. 56, 57).

We are content to characterize the picketing in question in the very language used by the Trial Court in stating its findings herein:

> "69. That the aforementioned placards were truthful in all respects, and contained no misstatements or misrepresentations.
>
> 70. That the picketing so conducted aforementioned, was done in a peaceful and orderly manner, without violence or threat thereof, and in no respect was it or did it create disorder" (R. 58).

E. The Grounds Upon Which the Injunction Was Based

Upon the facts aforesaid, the Trial Court concluded:

> "2. That the plaintiffs are the sole persons required to run their business and therefore they are not subject to picketing by a union or by the defendants who seek to compel them to employ union labor" (R. 59).

Accordingly, the Trial Court issued a permanent injunction absolutely enjoining the aforesaid activities of the defendant union (R. 61, 62; 14 N. Y. Supp. [2nd] 198, no official report).

Upon appeal by the defendants to the Appellate Division of the Supreme Court of the State of New York, First Department, the judgment of the Trial Court was affirmed by a divided court (R. 185-189; 259 App. Div. 868, 19 N. Y. Supp. [2nd] 811). The majority of the Appellate Division wrote no opinion (R. 188-189). The dissenting opinion of Mr. Justice Callahan, in which Mr. Justice Dore concurred, held that, despite the absence of an employment relationship between the parties, the union was lawfully entitled to picket in a peaceful manner in defense of its vital interests.

Upon appeal to the Court of Appeals of the State of New York, the judgment below was affirmed without opinion (R. 192-196; 284 N. Y. 788).

IV

Specification of Errors to be Urged

The Court of Appeals of the State of New York erred in holding that an absolute injunction against peaceful and orderly picketing could properly issue merely because no employment relationship existed between the members of the defendant union and the peddlers and wholesale and retail bakers. The injunction violated the First and Fourteenth Amendments of the Constitution of the United States in that it absolutely prohibited the exercise of the constitutional privilege of freedom of speech. The record being admittedly devoid of evidence of any wrongful activity on the part of the defendants, characterization by the State Court of the defendants' conduct as illegal was utterly unwarranted, and furnished no basis for curtailment of the constitutional privilege. Such is the single but fundamental error here urged.

V

Summary of Argument

A. The activities of the defendants were in no respect wrongful.

1) No statute was violated; per contra the conduct prohibited is in accord with the legislative policy of the State of New York;
2) No violence was committed;
3) No fraud was committed;
4) No disorder was created;
5) No coercion was practiced.

B. The alleged common law policy of the State of New York is not controlling in the determination of the constitutional question here involved.

C. No factual basis for prohibiting the exercise of the privilege of free discussion exists in the case at bar.

1) The purpose sought to be accomplished was not contrary to public welfare;
2) The means adopted to accomplish the purpose were not contrary to public welfare.

D. The judgment of the State Court inaugurates judicial censorship of speech in labor controversies.

E. Conclusion: The judgment of the Court of Appeals of the State of New York should be reversed.

VI

ARGUMENT

A. The activities of the defendant were in no respect wrongful.

1) No statute was violated; the conduct prohibited is in accord with the legislative policy of the State of New York.

The peaceful picketing conducted by the defendant union admittedly violated no statute of the State of New York. *Per contra,* examination of the statute books of that State shows that its Legislature has definitely expressed its approval of such conduct, and has forbidden injunctive interference therewith.

Section 876-a of the Civil Practice Act of the State of New York (L. 1935, Ch. 477, in effect April 25, 1935) is modeled after the Federal Norris-LaGuardia Act (29 U. S. C., Secs. 101-115) and except for minor differences in language is identical with the Federal Act.

Section 876-a of the New York Civil Practice Act forbids any court or judge to grant injunctive relief, in any case

involving or growing out of a labor dispute, which prohibits the following acts, among others:

> "(5) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, picketing, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace."
>
> "(8) Advising or notifying any person or persons of any intention to do any of the acts heretofore specified."

In defining the term "labor dispute" the statute expressly states in the following language that the disputants need not stand in the relation of employer and employee:

> "(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee regardless of whether or not the disputants stand in the relation of employer and employee."

The above quoted statute does not purport to set forth an exclusive list of the labor activities which are permissible in the State of New York; it merely sets forth those activities which the Legislature of the State has deemed of sufficient importance to be worthy of special protection. Accordingly, no matter how narrowly the statute be construed, it cannot possibly be said *to forbid* peaceful picketing of peddlers on account of the fact that such peddlers employ no helpers. Nor has there ever been such a judicial construction of the statute by any court of the State of New York.

We have referred to the above statute solely for the purpose of demonstrating that the conduct of the defendants is in direct accord with the public policy of the State of New York as expressed by its Legislature. It has never been contended in the case at bar that the statute *prohibits* the acts of the defendants here in question, and there has never been allegation or proof that any other statute has been violated.

2) No violence was committed.

The conduct of the defendants was admittedly peaceful in all respects. No act of violence of any nature was committed.

Upon the trial, the attorney for the plaintiffs made the following concession:

> "The Court: Will you concede, however, that in the picketing so far as has been testified to, there were no acts of violence or threats of violence, disorderly picketing or misstatements?
>
> Mr. Apfel: Conceded" (R. 148).

As has previously been noted, the Trial Court found:

> "70. That the picketing so conducted aforementioned, was done in a peaceful and orderly manner, without violence or threat thereof, and in no respect was it or did it create disorder" (R. 58).

3) No fraud was committed.

We again refer to the above quoted concession made by the plaintiffs' attorney, upon the trial of this action, which covered fraud as well as violence, and which expressly admitted that the defendants had made no misstatements (R. 148).

The finding of the Trial Court in this respect is as follows:

> "69. That the aforementioned placards were truthful in all respects, and contained no misstatements or misrepresentations" (R. 58).

4) No disorder was created.

The concessions of counsel and findings of the Trial Court which we have already examined show also that the defendants' conduct was not disorderly, the Trial Court having found that "in no respect was it or did it create disorder" (R. 58).

5) No coercion was practiced.

The foregoing analysis of the conduct of the defendants makes it obvious that the acts of the defendants were in no respect coercive, for the essence of coercion is the utilization of wrongful, as distinguished from peaceful, means of persuasion. To characterize peaceful persuasion as coercion is to use language arbitrarily, with complete abandonment of objectivity. It is clear that there was no factual basis for the belated characterization of the conduct of the defendants in the case at bar as "an attempt to coerce a peddler", which is found in the opinion of the New York Court of Appeals in the case of *Opera on Tour* v. *Weber*, 285 N. Y. 348, 357. The word "coerce", so used, is obviously a term of art, having no verifiable factual content, and serving merely to rationalize a legal conclusion. (See Frankfurter & Greene, *The Labor Injunction*, pp. 34-35, 61.)*

B. The alleged common law policy of the State of New York is not controlling in the determination of the constitutional question here involved.

It is the contention of the respondents that the common law policy of the State of New York forbids peaceful picketing conducted for the purpose of persuading one who engages no employees to hire members of a labor union. It is further contended that, by virtue of the dec-

*"Unwittingly a court may be pronouncing judgment upon the implications of a label, instead of weighing the elements of an industrial conflict as it actually transpired" (Frankfurter & Greene, op. cit., p. 35).

laration of such policy, the New York State courts may prohibit the exercise of the constitutional privilege of freedom of speech, and that such judicial restraint of the privilege is not subject to review by this Court. The argument of the respondents is thus stated at page 11 of the respondents' brief in support of their application for rehearing:

> "The prohibition against picketing to effect such a purpose is solely a question of local policy to be determined by Court of Appeals of New York."

The same argument was presented for determination and unequivocally answered by this Court in the case of *American Federation of Labor* v. *Swing*, 312 U. S. 321.

In the latter case it was alleged that the common law policy of the State of Illinois prohibited peaceful picketing, or peaceful persuasion, on the part of "strangers to the employer". Accordingly, it was asserted that the decree of the Illinois court enjoining such conduct could not be set aside by this Court. In disposing of the issue thus presented, this Court stated:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. American Foundries v. Tri-City Council, 257 U. S. 184, 209. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more

be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could be the utterance protected in Thornhill's case. 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' Senn v. Tile Layers Union, 301 U. S. 468, 478" (312 U. S. 321, 325-326).

No sound reason for distinguishing the case at bar from the *Swing* case is to be found in the record.

A common law doctrine in New York, to the effect that the peaceful picketing of one who engages no employees is illegal, is no less an interference with the constitutional privilege of freedom of speech than an Illinois doctrine to the effect that picketing by "strangers to the employer" is illegal. The vice in each case is that the agency of the State arrogates to itself not merely the limited power to regulate but the unlimited power to prohibit absolutely.

The basic purpose of the constitutional guarantee is indeed defeated if in the name of local policy the State courts are granted authority to determine not only how one must speak but also what may be spoken. The gist of the guarantee has been compactly stated by Lord Justice Scrutton in *Rex* v. *Secretary of Home Affairs*, [1923] 2 K. B. 361, 382, in these words, quoted by Mr. Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357, 377:

> "You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous * * *"

To regulate the conditions of public utterance so as to prevent obscenity, incitement to violence, fraud or other criminal conduct is a proper function of the State. There can be no question that the exercise of the privilege of freedom of discussion is necessarily subject to such limitations. On the other hand, where speech is not used as a cloak for criminal conduct, it may not be proscribed by

the State merely because of disapproval of the end sought to be achieved. The essence of the constitutional guarantee is that it assures that error may be spoken as freely as truth, that unpopular thought may be voiced as freely as the accepted dogma of the day, to the end that an unfettered exchange of ideas by free men may produce and maintain a democratic society. It is therefore of the utmost importance that the State's limited power to regulate shall never be permitted to grow into an absolute power to destroy.

What we have said with reference to the power of the State generally applies a fortiori to a judicial organ of the State, purporting to express the policy of the State by a declaration of common law principles.

In *Cantwell* v. *Connecticut*, 310 U. S. 296, 304, this Court stated:

> "In every case the power to regulate must be so exercised as not in attaining a permissible end, unduly to infringe the protected freedom."

This Court further stated, in the same opinion:

> "Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions" (310 U. S. 296, 308).

In *Herndon* v. *Lowry*, 301 U. S. 242, 258, this Court declared:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."

A declaration of "illegality" by a State Court may not *ipso facto* be deemed to justify an injunctive interference with the exercise of a constitutional privilege. In *American Federation of Labor* v. *Swing*, supra, the decree of the Illinois Court recited:

> "That this Court and the Supreme Court of this State have held in this case that, under the law of this State, peaceful picketing or peaceful persuasion *are unlawful* when conducted by strangers to the employer (i. e., where there is not a proximate relation of employees and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees" (312 U. S. 321, 324). (Italics ours.)

The Illinois Court thus outlawed the communication of opinion in support of a purpose which it disapproved. This result was rationalized, as in the case at bar, simply by the use of a characterization. In the case at bar, the New York Court of Appeals wrote no opinion, but in its later opinion in the case of *Opera On Tour* v. *Weber*, 285 N. Y. 348, 357, stated:

> "We have held that the attempt of a union to coerce the owner of a small business, who was running the same without an employee, to make employment for an employee, was an unlawful objective and that this did not involve a labor dispute (Thompson v. Boekhout, 273 N. Y. 390). So, too, in a case just unanimously decided, we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week (Wohl v. Bakery and Pastry Drivers, 284 N. Y. 220)."

This characterization by the New York Court of the purpose of the defendants as "an unlawful labor objective" has, of course, no greater sanctity than the declaration by the Illinois Court that the conduct there considered was "unlawful". In neither case is there to be perceived an

intrinsic evil in the conduct condemned by the State Court. If the Illinois Court was without the power to interfere with free speech in order to prevent the picketing of employers by "strangers", then the New York Court was likewise without the power to interfere in order to prevent peaceful picketing for the purpose of persuading a non-employer to hire an employee. The conduct prohibited by the New York Court exhibits no more attributes of evil, is no more subject to characterization as *malum in se*, than the conduct prohibited in Illinois. In each case the interference with peaceful picketing was violative of the constitutional guarantee for the reason that the conduct prohibited was essentially and exclusively an exercise of the privilege of free communication of ideas, and involved no deceitful or malicious use of language to accomplish a crime. The State Courts therefore themselves usurped unlawful power in applying the epithet "unlawful" to the activities in question.

To assert that the application of the epithet "unlawful" by an agency of the State to conduct otherwise privileged bestows upon the determination of that agency immunity from review upon Federal grounds is to beg the question at issue. Even in the case of legislative acts, State or Federal, pronouncements concerning the alleged evils of the prohibited conduct are not controlling. In *United States v. Carolene Products Co.*, 304 U. S. 144, 152, this Court stated:

> "We may assume for present purposes that no pronouncement of a legislature can forestall attacks upon the Constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."

In *Schneider* v. *State*, 308 U. S. 147, 161, this Court stated:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.
>
> In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

In *Thornhill* v. *Alabama*, 310 U. S. 88, and in *Carlson* v. *California*, 310 U. S. 106, legislative declarations that peaceful picketing constituted a public evil were properly disregarded by this Court because the prohibited conduct was but an exercise of the privilege of free discussion, and the legislative declarations of the alleged evil thereof were merely conclusions, lacking factual support.

The proper test to be applied to determine the validity of a conclusion of social evil, made by an agency of the State for the purpose of supporting an interference with the exercise of the privilege of free discussion, was stated in the following language by this Court in *Thornhill* v. *Alabama*, supra, at pages 104-105:

> "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in

> society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

Finding no factual proof of any such "*clear danger of substantive evils*", this Court rejected the empty conclusions of the State courts in *Thornhill* v. *Alabama*, supra, and in *Carlson* v. *California*, supra.

The pronouncement of "illegality" made by the New York Court of Appeals having no controlling weight, we may now briefly analyze the prohibited conduct in the case at bar for the purpose of ascertaining whether *as a matter of fact* there was any basis for placing it in the category of the unlawful.

C. No factual basis for prohibiting the exercise of the privilege of free discussion exists in the case at bar.

As we have already pointed out under Point A, supra, the conduct of the defendants here in question did not involve the commission of any recognized tort nor the violation of any statute of the State of New York. Per contra, the conduct was in direct accord with the policy of the State as expressed by legislative enactment in Section 876-a of the Civil Practice Act.

In what respects then may the facts be said to support a judicial declaration of illegality?

This Court has firmly adopted the rule first stated by Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 247, and later expressed in greater detail in the concurring opinion of Mr. Justice Brandeis, in which Mr. Justice Holmes joined, in *Whitney* v. *California*, 274 U. S. 357, that

no restriction of the exercise of free speech is justified under the Constitution, unless the following three factors are established:

1) Proof of the existence of a clear danger to the public welfare,

2) Proof that the danger is imminent,

3) Proof that the danger is sufficiently substantial to justify the restriction in question.

In *Whitney* v. *California*, 274 U. S. 357, 376, Mr. Justice Brandeis stated the rule as follows:

> "To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one."

Similiar expression has been given to the rule in the opinions of this Court in *Herndon* v. *Lowry*, 301 U. S. 242, *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *California*, 310 U. S. 106.

The rule is a rule of practical reality. It calls for facts rather than conclusions. We test the applicability of the rule to the case at bar, therefore, by considering whether any *factual basis* for the restriction of the privilege by the State Court exists.

For convenience of analysis the defendant's conduct may be considered from two aspects: (1) the purpose sought to be accomplished, and (2) the means adopted to accomplish the purpose.

1) The purpose sought to be accomplished was not contrary to public welfare.

In the statement of facts hereinabove set forth, we have fully described the peddler system and the menace thereof to the established standards of the defendant union,

and we shall not burden the Court with reiteration of those facts here. It will here suffice merely to recall that it was the legitimate self-interest of the union which prompted the union to act as it did, and that the record is completely free of any suggestion of malice.

The specific aim of the union was simply this: *To obtain employment for its members by peddlers for one day out of seven.*

Certainly, it is now too late to contend that to seek employment for members of a union is an illegal activity. The basic spirit of all contemporaneous labor legislation, both State and Federal, is to insure that the effort to obtain and maintain such employment shall be unobstructed by undue bargaining advantages through the utilization of tactics commonly termed "unfair labor practices". That industrial strife will be minimized and the National welfare best served by sanctioning such activity is now a recognized economic truth.

National Labor Relations Act, 29 U. S. C., Sections 151-166.

New York State Labor Relations Act, New York Labor Law, Sections 700-716.

The only additional factor in the case at bar which remains to be considered is the fact that the proposed employers happen to be peddlers, who engage no assistants. The question to be answered thus resolves itself to this: *Is there then any factual basis for holding that utterly different principles ought to be applied to such peddlers?*

No sound reason appears for holding that the decision of a business entrepreneur to conduct his business without any employees whatever ought to be placed in a category more sacrosanct than that in which the decision of other entrepreneurs to conduct their businesses with employees, *but without union employees,* is placed.

In each instance, the desire of the proprietor is contrary to the desire of the labor union. In each instance,

the maintenance of democratic industrial relations requires, however, that the desires and opinions of the proprietor and of the union be accorded equal respect. In each instance, therefore, unless the Courts are to assume power to supervise labor organizations, it is the function of the Courts, not to favor either of the disputants, but simply to enforce fair rules of conflict between them. Protection of the exercise of the privilege of free speech by means of peaceful picketing, or otherwise, involves no determination of the merits of the dispute in question; the disputants are merely guaranteed the right to appeal to the public for support, and public opinion, rather than judicial determination, is the final arbiter.

If it be argued that peddlers are a class of proprietors entitled to special protection, then it must be answered that no factual study has ever been made, so far as we know, which establishes or tends to establish the merits of such a contention. Nor has there been legislative investigation or determination of this factual question by the State of New York. Nor is there proof of any sort in the record herein which supports such a conclusion. On the other hand, not only has the union's purpose to secure employment by peaceful picketing been expressly declared to be in accord with the policy of the State of New York, by legislative enactment based upon factual study (New York State Labor Relations Act, New York Labor Law, Sections 700-716; New York Civil Practice Act, Section 876-a), but the record herein is replete with proof of the social and economic evils of the peddler system (R. 50-54).

It is thus apparent that there is no factual basis whatever for the statement by the New York Court of Appeals that "* * * it was an unlawful labor objective to attempt to coerce a peddler * * *", this statement being but an empty conclusion having no factual content.

The vigorous dissenting opinion of the minority of that Court, written by Chief Judge Lehman in the *Opera* case, plainly recognized the lack of factual support for such

determinations by the Court, and the unconstitutionality of the Court's instrusion into this area of economic conflict. Judge Lehman's opinion characterized the decision of the Court in that case as:

> "* * * an intrusion by the Court into a field from which it is excluded under the laws of the State as formulated in an unbroken line of judicial decisions, by statute of the legislature and by the Constitution. * * *" (285 N. Y. 348, 366-367).

While recognizing that, under proper circumstances, the Legislature might, based upon an examination of the facts, make appropriate regulations restricting labor activities, the minority opinion clearly pointed out that the Courts, without such factual basis, lacked the power to impose such restrictions upon personal liberties:

> "The Legislature exercising its power, within the framework of the Constitution, to promote the public welfare may restrict or enlarge the field within which such combinations may lawfully act, the purposes which they may lawfully promote, and even the means which they may lawfully use; and its actions there may properly be dictated by its considered opinion of the economic, social or political consequences and the effect upon the public welfare of combinations to achieve particular ends. Because the Legislature has such power and its action may properly be dictated by such considerations, a discriminating electorate will be guided in its choice of members of the Legislature by the economic, social and political opinions of the candidates.
>
> The courts have no such power. A unanimous court approved and based their decision in Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 74, 159 N. E. 863, 866, 63 A. L. R. 188, on the statement in the opinion in that case that 'Demands of workmen may sometimes be fair and sometimes unfair. *Combinations give the workmen a power of compulsion which may work harm to their employer, the public, and even to themselves.* Where the workmen do not combine they may be compelled by force of economic

circumstances to accept unfair terms of employment. Such conflicting *considerations of economic policy are not primarily the concern of the courts.*' (Italics are new.)" (285 N. Y. 348, 368).

In the case at bar, the end result sought to be achieved by the defendants, namely, employment of members of the union by the plaintiffs, was clearly lawful. There is no prohibition in New York State, or in any other State of the United States, either at common law, or by statute, which forbids such employment. The decision of the Court of Appeals in the case at bar is thus found to rest upon the strange proposition that an unsuccessful attempt to achieve a lawful result is unlawful. It is immediately apparent that such a proposition cannot be sustained, unless it is postulated as follows: An attempt, *by unlawful means*, to achieve a lawful result, is unlawful. We shall now, therefore, consider the means utilized by the defendants. If, as we believe can be promptly demonstrated, the means utilized were not contrary to public welfare, the conclusion is inevitable that determination of illegality made by the Court of Appeals of the State of New York is utterly arbitrary and unwarranted.

2) The means adopted to accomplish the purpose were not contrary to public welfare.

The New York Court of Appeals in its later opinion in the *Opera* case characterized the conduct of the defendants in the case at bar as an "attempt to coerce", but as we have already demonstrated, under Point A(5), supra, the term "coerce" could not have been legitimately used in any factual sense, for admittedly the persuasive efforts of the defendants were entirely peaceful. Thus is definitely appears that the determination of the Court of Appeals as to the legality of the means, as well as the legality of the object here involved, was a conclusion devoid of factual content.

The complete propriety of the conduct of the defendants is shown by the following analysis of the defendants' activities and comparison thereof with the activities which this Court has approved in other cases. The activities of the defendants herein consisted solely of the following courses of conduct:

1) Carrying of placards in public places reading as follows:

"HYMAN WOHL

A BAKERY ROUTE DRIVER WORKS SEVEN DAYS A WEEK—WE ASK EMPLOYMENT FOR A UNION RELIEF MAN FOR ONE DAY. HELP US SPREAD EMPLOYMENT AND MAINTAIN A UNION WAGE HOUR AND CONDITION.

BAKERY & PASTRY DRIVERS & HELPERS LOCAL 802 I. B. OF T. affiliated with A. F. of L." (R. 57).

2) Requesting about five retail dealers in bakery products, who were customers of the plaintiffs, not to deal with the plaintiffs unless the plaintiffs would conform to the established union standards (R. 58, 59).

3) Requesting Diamond Baking Co., Inc., and Bernstein & Dickerman, the two wholesale bakers who distributed their products through the plaintiff peddlers, not to continue such method of distribution unless the plaintiffs would conform to union standards (R. 48, 49).

The legal propriety of each of these courses of conduct is clear.

1) The carrying of the placards was conduct immune from statutory or judicial restraint under the decisions of this Court in *Thornhill* v. *Alabama*, *Carlson* v. *California* and *American Federation of Labor* v. *Swing*.

2) The request made to the retail dealers in bakery products was similar to the activity of the union involved in the cases of *Milk Wagon Drivers* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, and *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, except that in the case at bar no violence or threat thereof was involved. The findings of fact of the Trial Court show that no suggestion of pressure other than a lawful appeal to the public was ever made by the defendants. The defendants merely informed the retail dealers of the Union's policy in regard to the peddler system and stated that a picket with a placard in the form above quoted would be placed in the neighborhood if the union's request was denied:

> "That on the 25th day of January, 1939, a member of the defendant union followed plaintiff Platzman as he was distributing his products, and went into two or three places of business of said plaintiff's customers and advised one of said customers that the union was seeking to persuade the plaintiff to work but six days per week and employ a union driver as a relief man, and further stated to the said one customer that in the event he continued to purchase from plaintiff Platzman, that on the following day a picket would be placed in the vicinity of said store with a placard reading as heretofore set forth" (R. 58, 59).

Since the placard was unobjectionable, and the parading thereof was a lawful act, the threat to carry the placard in public places was necessarily lawful, for that which may lawfully be done may lawfully be threatened.

3) What has been said with regard to item 2 applies with equal force to item 3. The requests made to the wholesale bakers, Diamond Baking Co., Inc., and Bernstein & Dickerman, were the same as those made to the retail dealers. It was not suggested in any instance that in the event of refusal any act would occur other than lawful picketing with the placards above described (R. 48, 49).

In summary, it may be stated that the means utilized by the defendants to achieve the result aforesaid, consisted solely of peaceful picketing and the utterance of oral statements to the effect that peaceful picketing would be undertaken if support for the defendants' program could not be achieved without such picketing. No danger to the public welfare can be found in such peaceful activities. The means adopted to achieve the union's purpose were as lawful as the hoped for results. The conclusion of illegality, upon which the decision of the Court of Appeals of New York in the case at bar rests, is utterly without factual support, both as to the purpose sought to be achieved, and as to the means adopted to achieve the purpose, and that conclusion must be cast aside by this Court.

D. The judgment of the State Court inaugurates judicial censorship of speech in labor controversies.

Analysis of the rationale of the New York Court of Appeals, enunciated by the majority of that Court in the *Opera* case, definitely shows that the determinations of "unlawful labor objectives" made in that case and in the case at bar are based upon no uniformly applicable set of economic or legal principles. It is impossible to extract from such determinations any valid rule of general application respecting the "lawfulness" of "labor objectives". Instead, it becomes clear, as the decisions are analyzed, that in each case the Court assumed the power to render an *ad hoc* determination, upon the merits of the particular social-economic problem presented, and accordingly to restrict freedom of speech.

In the case at bar, according to its later explanation, the Court of Appeals found that a peaceful effort to obtain employment from a peddler engaging no employees was unlawful.

In *Thompson* v. *Boekhout*, 273 N. Y. 393, cited in the *Opera* case as a precedent, the Court of Appeals found

that an attempt to obtain employment from an ex-employer who had decided to dispense with employees was unlawful.*

In the *Opera* case, the Court of Appeals found that a peaceful effort to obtain employment from an employer who preferred to use mechanical means for the production of music was unlawful.

No fundamental legal principle governing these various determinations can be postulated. The decisions do not even purport to be based upon any factual analysis of social and economic needs. Nor do these determinations furnish any guide to future judicial policy. They merely warn that henceforth labor organizations are not free to formulate objectives until judicial approval has been obtained. By virtue of these decisions, the "legality" of a "labor objective" is to be determined *de novo* in each case which comes before the court. Persons interested in labor disputes will have the privilege of communicating their opinions to others only if the State court approves the object sought to be attained, and whether or not that object meets judicial approval will be known only when the court has ruled.

That the adoption of such a doctrine constitutes absolute and unconfined judicial censorship of speech cannot intelligently be doubted.

Thus far the Court of Appeals has placed in the category of the unlawful, under its newly assumed power to rule upon the legality of labor objectives, only the three types of activity above listed. There is not, however, to be perceived any limiting factor in the Court's policy, and the list of the unlawful may be expected to grow as new controversies are litigated. Under the policy aforesaid, the Court's supervision of "objectives" is not necessarily limited to the field of labor controversies. The same logic, or illogic, would permit the determination by the Court of the legality of all objectives sought to be attained by the

*This only if we accept the post-litem explanation, for on its face all the opinion held was that Section 876-a of the New York Civil Practice Act was inapplicable.

free communication of ideas. Thus it may reasonably be expected to follow, if the decision in the case at bar is held constitutionally sound, that State courts will assume the power to declare generally in what causes banners may be carried, pamphlets distributed, and oral statements voiced, and in what causes silence must be maintained. This forecast may not be dismissed as *reductio ad absurdum;* this is precisely what the Court has already done in the field of labor controversies, and before this doctrine has become rooted, there is urgent need to inquire by what authority the field of labor controversy, more or less than any other field of human activity, merits subjection to judicial censorship. The State judiciary has assumed to exercise a power in the case at bar which thus far neither legislative nor even administrative agencies of the State have ever ventured to exercise. The continued exercise of such power is fraught with a danger most grave and most immediate.

E. CONCLUSION

The judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

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